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No. 89-1294

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBORAH CASSILLY,

Petitioner,

v.

MARYLAND DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The Court of Appeals of Maryland

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16 pp

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the administrative agency which permanently revoked petitioner's day care center license because of shocking evidence of child abuse at the center violate petitioner's federal due process rights when (1) the agency's action is sustainable based on substantial evidence as to which petitioner raises no constitutional objection; (2) petitioner had the opportunity to challenge the medical and other evidence presented against her; and (3) petitioner never invoked her right to subpoena the children whose hearsay statements she now challenges?

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COUNTERSTATEMENT OF THE CASE

A. Preliminary Proceedings.

Bo Peep is a child day care center located north of Baltimore in Harford County, Maryland. In July, 1987, agencies of the State of Maryland (now respondents and here collectively referred to as "the State") sought injunctive relief in the Circuit Court for Harford County against Bo Peep based on preliminary, but severe, allegations of child abuse at the facility. Following four days of evidentiary proceedings, the court issued an injunction preventing a male staff member (the husband of the center's licensee)

from being on the premises. The State continued its investigation. (App. at 4a.)[1]

B. The Suspension Case.

By letter dated July 6, 1987, the Harford County Health Department advised petitioner Deborah S. Cassilly that her license to operate Bo Peep would be suspended because of (a) reports of violations of the State Group Day Care Regulations and (b) evidence of abuse of children enrolled at the facility.[2] Ms. Cassilly appealed the Health Department's action, triggering a seven-day evidentiary hearing in August and September, 1987. (App. at 4a.) On November 16, 1987, the administrative hearing officer issued his Findings of Fact, Conclusions of Law and Proposed Decision, recommending that Bo Peep's license be suspended for the duration of the licensing period, which expired on March 31, 1988. (App. at 4a.)[3]

The hearing officer concluded that "convincing" evidence of physical and sexual abuse of children enrolled in the facility "in and of itself mandates that suspension of a license to operate this day care facility

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[1] Citations in the form "App. at ___" are to the appendix to the Petition for Certiorari. The court also authorized the local police department to make random checks on Bo Peep; ordered the maintenance of a log documenting the entry and exit of every male twelve years or older; and required that Bo Peep document and report all injuries to children on the premises. (App. at 4a.)

[2] Although Ms. Cassilly is the petitioner here, the party in all proceedings below was the day care center, Bo Peep. Ms. Cassilly was the licensee who operated that facility. (App. at 2a.)

[3] Ms. Cassilly did not append the hearing officer's November 16, 1987 proposed decision to her petition. Portions of that decision are quoted in the decision of the Court of Appeals.

be upheld." In reviewing the evidence of abuse adduced at the hearing, the hearing officer concluded that "[t]he evidence in this case points in no other direction" than sexual child abuse: "the physical examination of the children involved here and their behavioral changes as observed by their parents and trained professionals allow no other conclusion to be drawn." (App. at 5a.) Following three separate levels of administrative review, the hearing officer's findings and conclusions were adopted as the final agency decision. (App. at 5a.)

C. The Revocation Case.

By letter dated March 26, 1988, the Harford County Health Department advised Deborah Cassilly that her application to renew her license was denied, and her license was permanently revoked. (App. at 5a; 136a-138a.) Again, Ms. Cassilly appealed and requested a hearing. By letter dated May 2, 1988, just nine days before the commencement of the scheduled hearing, Bo Peep requested sweeping discovery, including an order that the State "make available for interview [by a health professional chosen by Bo Peep] those children who were involved with allegations of child abuse at Bo Peep." (App. at 5a.) Following oral argument on May 11, 1988, the hearing officer denied Bo Peep's request to compel these "interviews." (App. at 6a.)

The revocation case lasted nine days during May and June, 1988. Unlike the earlier suspension hearing, which concerned an array of licensing violations, including, but not limited to, abuse and supervision of children, the revocation hearing solely concerned physical and sexual abuse. Furthermore, the evidence presented at the revocation proceeding "amply re-

veals that persons *still* at the Bo Peep Day Nursery have engaged in wilful misconduct which resulted in harm to the children." (App. at 107a) (emphasis added.)

The cumulative record relied on by the State in support of its decision to revoke Bo Peep's day care license documents shocking abuse perpetrated by senior Bo Peep staff. Two independent physicians with extensive experience in this field testified that eight children attending Bo Peep exhibited symptoms consistent with sexual abuse, including, *inter alia*, anal and vaginal injuries consistent with the insertion of an erect male penis, stretched and traumatized hymenal openings and extensive scarring and other injuries in the anal and vaginal areas. Furthermore, parents and treating professionals testified that they observed numerous instances of behavioral patterns and non-assertive verbalizations symptomatic of abuse on the part of children who had attended Bo Peep. (App. at 6a-7a; 79a-91a; 102a-107a.)[4]

On August 23, 1988, the hearing officer issued a 76-page proposed decision, concluding that the health department's decision to permanently revoke Bo Peep's license should be affirmed. (App. at 77a-135a.) The proposed decision was adopted as the final State agency decision on August 31, 1988. (App. at 76a.)

D. Subsequent Appellate Proceedings.

Bo Peep appealed the agency's final decision to the Circuit Court for Harford County. That court re-

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[4] The "State's experts" to whom Bo Peep repeatedly refers (*e.g.* Pet. at i, 5, 13, 15) were, in fact, therapists who were treating the children and not professional experts retained for this litigation.

versed, finding that the the children's statements to their parents and treating therapists were "foundational" to the State's case, and that Bo Peep's request for an interview of the children by its psychologist would have given it a " 'meaningful opportunity to test the credibility of the out-of-hearing statements. . . .' " (App. at 8a; 52a.) However, the trial court also concluded that the hearing officer had no authority to order such interviews and so the court held that the hearing officer should not have considered those statements. (App. at 7a-8a; 58a-59a.)

The State appealed the circuit court's decision, and the Court of Appeals of Maryland, the highest court in the State, granted review on the State's petition for a writ of certiorari prior to judgment in the intermediate appellate court. (App. at 8a.) The Court of Appeals unanimously reversed the trial court's decision, holding that the licensee's constitutional rights were not violated. (App. at 11a-28a.) The petition to this Court followed.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Review is unwarranted because the decision revoking Bo Peep's license is supported by an adequate and independent state ground, and because this case presents no novel or unsettled questions on which the state and federal appellate courts require the guidance of this Court. Further, through the testimony of physicians, parents, and treating therapists, the State painstakingly documented awful physical and sexual abuse of children at the hands of Bo Peep staff, and Bo Peep vigorously cross-examined these

witnesses. There is simply no merit to Bo Peep's claim that the Due Process Clause entitles it to more process than it received in these protracted administrative and judicial proceedings.

A. Even In The Absence Of The Statements That Bo Peep Now Contests On Constitutional Grounds, Substantial Evidence Exists To Support The Revocation Of Its License.

The out-of-court statements with which Bo Peep takes issue comprise only a portion of the vast amount of evidence which supports the administrative agency's decision to revoke Bo Peep's license. As the Court of Appeals noted, apart from these statements, there is "substantial" evidence to support the revocation of Bo Peep's license:

> The Department's decision was based on uncontradicted physical findings, on personal knowledge of adults concerning relevant, nonassertive conduct, on expert opinions based in part on psychologically pertinent history and, *only to a degree, on hearsay declarations which would have been inadmissible as substantive evidence in a judicial proceeding . . . Bo Peep does not contend that that hearsay was both so unreliable and so pervasive as to undermine the substantiality of the evidence against it.*

(App. 24a)(emphasis added).[5]

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[5] *See also* (App. at 12a)("The due process issue arises out of the largely circumstantial way in which the Department proved child abuse at Bo Peep. In general that proof fell into four categories: (1) testimony by physicians stating their observations when physically examining children and expressing their medical

Thus, as a matter of state law, the decision to revoke Bo Peep's license may be affirmed based on evidence completely independent of the children's out-of-court statements that Bo Peep contests. *See* Md. Ann. Code State Govt. Article, §10-215(g) (1984) (judicial review of agency decisions); *accord* (App. at 9a) ("Bo Peep does not argue that there was a lack of substantial evidence before the agency to support its findings of physical and sexual child abuse at Bo Peep."). The petition fails, therefore, to present a substantial federal question because the administrative agency decision that Bo Peep challenges may be affirmed on purely state law grounds. *Cf. Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate state ground.").

B. The Agency Afforded Bo Peep All The Process Which It Was Due.

Further, in holding that Bo Peep's due process rights were not violated, the Court of Appeals correctly applied the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Recognizing that this Court utilizes "a balancing analysis in deciding questions of procedural due process" (App. at 22a), the

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opinions based upon those observations; (2) testimony of parents, social workers and psychologists narrating their observations of relevant nonassertive verbal and nonverbal conduct of the children; (3) statements of history to treating clinicians; and (4) testimony from parents, social workers or other adults relating other assertive statements of the children, that is, statements relevant only for the truth of the content of the statements.").

court below held that a "straightforward application of the principles * * * from *Mathews v. Eldridge* demonstrates that due process has not been violated here." (App. at 22a-23a.)[6]

With respect to the first *Mathews* factor, the Court of Appeals found that "[n]o liberty interest is at stake." (App. at 23a.) While Bo Peep relies on inapposite criminal cases interpreting the Sixth Amendment's Confrontation Clause to support its claim that due process was violated here, it concedes that a liberty interest is lacking in this case. Addressing the second *Mathews* factor, the court below found that "[t]he procedures actually used by the Department greatly minimized the risk of an erroneous deprivation of Deborah's license. There were two protracted hearings before the agency at each of which Bo Peep was afforded all of the protections which will ordinarily satisfy due process requirements in contested administrative law cases. The record of a judicial proceeding in a circuit court was also made part of the agency record." (App. at 24a) (citations omitted.) Additionally, as the court below observed, Bo Peep either cross-examined or had the opportunity to cross-examine all adult witnesses, and thus " 'the probable

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[6] Quoting from *Mathews*, the Court of Appeals identified the three factors that are generally to be considered in analyzing a due process claim: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (App. at 22a)(*quoting* 424 U.S. at 335).

value, if any, of additional or substitute procedural safeguards' " was "minimal." (App. at 25a.)

Bo Peep does not dispute (1) that the hearing officer had no authority to subject the children to an independent examination, *see* (App. at 28a) ("Also weighing heavily against Bo Peep's request for implementation of an additional procedure is that the requested procedure was not within the power of the hearing officer. A court adjudicating a property interest in a civil matter has no authority to compel a pretrial psychological examination of a non-party witness. . . ."); (2) that while it could have resorted to existing procedures and invoked its right to subpoena the children whose statements it contested, *see* Md. Ann. Code, Health-General Article, §2-104(k) (1990 Repl. Vol.), that right was never exercised; (3) that it "either cross-examined or had the opportunity to cross-examine or subpoena any adult" concerning his or her influence on, and evaluation and communication of, children's statements repeated to the hearing officer (App. at 27a); or (4) that it called a range of fact and expert witnesses on its own behalf. (App. at 16a; 92a-101a.)

With respect to the third *Mathews* factor, the Court of Appeals placed appropriate special emphasis on the fact that "the State has an interest in protecting the children from further anxiety, even if there would be less emotional trauma in a psychological interview than in a cross-examination." (App. 28a.) Bo Peep does not challenge the significance of the governmental interest at stake in this case.

In sum, the Court of Appeals' application of the principles set forth in *Mathews* has not led to a result warranting this Court's exercise of its discretionary

certiorari jurisdiction to review this factually unique and legally unremarkable case. To the contrary, the decision below is consistent with those of other courts which have held that due process does not entitle a party accused of child abuse in a civil proceeding to subject abused children to examination when other procedures exist to challenge adverse evidence. *See, e.g., Rodgers v. Norfolk School Board*, 755 F.2d 59 (4th Cir. 1985); *Green v. Board of School Commissioners*, 716 F.2d 1191 (7th Cir. 1983); *see also Papapetropoulous v. Milwaukee Transport Services, Inc.*, 795 F.2d 591 (7th Cir. 1986).[7]

C. Bo Peep Waived Its Due Process Claim.

Review is also unnecessary because Bo Peep's alleged "right of confrontation", Pet. at 17-18, was never exercised and, therefore, was waived. Bo Peep never so much as requested, as it had a right to do, that the hearing officer issue subpoenas to the children whose statements comprised part of the State's evidence. Thus, due process is not offended by the introduction of the children's statements. *See Richardson v. Perales*, 402 U.S. 389, 402 (1971) ("We conclude that a written report by a licensed physician who has examined the claimant * * *, despite its hearsay character and an absence of cross-examination, * * * may constitute substantial evidence supportive

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[7] Thus, there can be no claim that review is warranted here to resolve a conflict between the decision below and that of other state or federal appellate courts. Indeed, as the court below expressly found, its decision is not contrary to those of other courts. (App. at 22a) ("We have neither been cited to, nor found, any decision involving administrative proceedings in which the contention was made that procedural due process required a pre-hearing examination of a nonparty by a health care professional.").

of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.").

Bo Peep attempts to excuse its undisputed failure to subpoena the declarants of the statements it challenges, claiming that the State had "strong arguments for quashing the subpoenas * * * on grounds of the harmful psychological effects testifying might have on a child, and on the basis of the incompetence of the children to testify." Pet. at 9-10 n.2. But Bo Peep cannot claim that it was denied the "opportunity to interview the children directly", Pet. at 20, when it never even attempted to avail itself of the hearing officer's subpoena power to "confront its accusers" or to compel "interviews" of the children. *See United States v. Cree*, 778 F.2d 474, 478-79 (8th Cir. 1985).[8]

CONCLUSION

For the reasons stated, the petition should be denied.

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[8] Further, unlike *Turner v. Commonwealth*, 767 S.W.2d 557 (Ky. 1988), *cert. denied*, 110 S.Ct. 260 (1989), which Bo Peep states is "in striking contrast" with the decision below (Pet. at 22), not once during any of the administrative proceedings in this case did Bo Peep seek physical examinations of the children. Bo Peep waived its right, therefore, to "confront" the children whose statements it challenges. *See Cree*, 778 F.2d at 478 (holding that no constitutional right was violated when the defense failed to call a child to the stand and that child was present at trial, "as the defense did not make even the slightest attempt to confront" the child).

Respectfully submitted,

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